No. 3746

In the

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN SAMLIN,

Plaintiff In Error,

vs.

UNITED STATES OF AMERICA,

Defendant In Error.

Brief of Defendant in Error

Upon Writ of Error to the United States District Court for the District of Montana.

Appearances:

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I.

In seeking a reversal of the judgment herein, the plaintiff in error contends: (1) that the penalty for the unlawful sale of intoxicating liquor is "vastly different from the penalty imposed for maintaining a nuisance under Sec. 21 of the National Prohibition Act"; (2), that the unlawful sale of intoxicating liquor is not included in the charge of maintaining a common nuisance under said Sec. 21, but is a separate and distinct offense; (3), that the verdict does not respond to the

charge in the information herein; (4), that the constitutional right of the defendant to be informed of the nature and cause of the accusation has been violated by the entry of the judgment herein; and (5), that a fendant charged with the unlawful sale of intoxicating liquor under the National Prohibition Act is entitled to be informed as "to the kind of sale" he is charged with having made.

As to the first contention, namely, that the penalty for selling intoxicating liquor unlawfully is vastly different from the penalty for maintaining a nuisance, it would appear that no argument is required to show its inapplicability to the case at bar, for difference in punishment, whether vast or otherwise, does not preclude a verdict of guilty of a lesser charge which is necessarily included in that contained in the indictment or information. This is well illustrated by the cases cited below sustaining judgments of conviction of lesser crimes than those charged, as, for instance, conviction of manslaughter upon the charge of murder and conviction of attempts to commit the crime charged in the indictment or information.

While it is true that there is a difference between the penalties imposed for maintaining a nuisance and for the unlawful sale of intoxicating liquor (as for the first offense), it is that very difference, so far as the maximum penalties are concerned, that makes the unlawful sale of intoxicating liquor (as for a first offense) a lesser crime than that of maintaining a nuisance.

It is provided by Sec. 21 of said National Prohibition Act that a "person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1000 or be imprisoned for not more than one year, *or both.*" The penalty for the unlawful sale of intoxicating liquor for a first offense is fixed by Sec. 29 of the Act as a fine of not more than One Thousand Dollars *or* imprisonment not exceeding six months. The penalty for a first offense under Sec. 29 is less than that prescribed for maintaining a nuisance.

The record in this case is silent as to whether plaintiff in error had been previously convicted of the offense of unlawfully selling intoxicating liquor, and since the punishment imposed, to-wit, imprisonment for five months, is within the limits prescribed for a first offense, it will be presumed that no evidence was offered of a prior conviction.

II.

As to the second contention of plaintiff in error, namely, that the unlawful selling of intoxicating liquor is not included in a charge of maintaining a nuisance under the National Prohibition Act, but is a separate and distinct offense, it is sufficient to say, conceding that they are separate and distinct offenses, yet it does not follow that the unlawful selling is not included in the charge of maintaining a nuisance. Burglary and larceny, for instance, are separate and distinct offenses, and so, also are murder and man-

slaughter, and the same might be said of any lesser offense that is included in a greater offense. It is no argument to say that a greater offense does not include a lesser offense because they are separate and distinct offenses. The case of Poole v. United States, 273 Fed. 623 has no possible application to the case at bar, because the question of inclusion of offenses was not involved as that question is raised here. In the Poole case, the defendant was charged with three separate violations of the Volstead Act, each one in itself a distinct offense. In the case at bar, there is only one count. In effect, the contention of the defendant in the Poole case was that his actions or omissions constituted but one crime, or one violation of the Prohibition Law. The offenses were not necessarily inter-related, the defendant having violated three different sections of the Volstead Act, namely (1) manufacturing liquor without a permit under Sec. 6; (2) manufacturing liquor without making the permanent record required under Sec. 10; and (3) possessing property designed for the manufacture of liquor for use in violation of the Act, under Sec. 25.

The case of Dusold v. United States, 270 Fed. 574, (C. C. A. 7), cited by plaintiff in error, does not even discuss the question of the inclusion of offenses.

III.

The next contention of plaintiff in error, namely, that the verdict does not respond to the charge contained in the information is disposed of by what is

said above. It might as well be argued that a verdict of guilty of manslaughter is not responsive to a charge of murder or that, in fact, a verdict of guilty of any offense included within a greater offense charged in the indictment or information does not respond to the charge of the greater offense. Such an argument merely begs the question, and the same might be said of the fourth contention of plaintiff in error, namely, that the contitutional right of the defendant to be informed of the nature and cause of the accusation has been violated by the entry of the judgment herein.

It is true that Samlin was not charged directly with the unlawful selling of intoxicating liquor, but, it is submitted, that the language of the charge in the information clearly indicated to him all of the allegations which the defendant was bound to prove, thereby enabling him to prepare a defense. He knew that evidence in support of the information was bound to be introduced to show, first, that Samlin maintained the specified building; second, that intoxicating liquor was sold therein in violation of law, or, third, that intoxicating liquor was kept therein in violation of law. Being presumed to be a person of ordinary understanding, he knew that the selling of liquor in the building involved the keeping (meaning possession) of liquor therein, for, sale under the Volstead Act implies delivery, and there could not be a sale of liquor in the building unless the liquor was actually present therein. He knew that such sales could be proved to have occured during the period within the

statute of limitations, and that such proof would necessarily show the time, place, persons present, the seller, the purchaser, the kind of liquor sold, and the price. He knew from the language of the information, that the unlawful traffic in liquor in the specified building is the gist of the offense. Proof of maintenance of the nuisance by the defendant is generally a mere incident in cases of this character. By this we do not mean the maintenance on the part of the defendant is not a material ingredient of the offense charged in the information, but that the unlawful selling of intoxicating liquors in the specified building is really the corpus delicti, after all.

IV.

As to the contention of plaintiff in error that a defendant charged with the unlawful sale of intoxicating liquor is entitled to be informed "as to the kind of sale" he is charged with having made, it is sufficient to say that if the proof disclosed that the sales were made under a permit and a record of the sales was kept, there would have been no unlawful sales, and the language of the information is sufficiently explicit to charge the defendant with knowledge that evidence of "any kind of a sale" in violation of Title II of the National Prohibition Act was admissible, and he could expect it would be introduced; and hence, the permit, if there was one, and the record, if there was one, could be introduced to show that the sales were not unlawful.

V.

The law and the decisions support the judgment in this case.

> "The general rule at common law was that when an indictment charged an offense which included another less offense or one of a lower degree, defendant, although acquitted of the higher offense, might be convicted of the less."
>
> 22 Cyc. 466.
>
> "Where the charge of the greater offense contains the essential elements of a lesser offense, the jury may acquit the defendant of the graver charge and find him guilty of the less offense included therein; and such provision is usually made by statute."
>
> 22 Cyc. 472.
>
> "On a special verdict sustained by the evidence, it is the duty of the court to enter judgment thereon for or against the accused."
>
> State v. Moore, 29 N. C. (7 Ired. L.) 228.

It will be observed in this case that the plaintiff in error does not question the sufficiency of the evidence to sustain the verdict, so it will be presumed that so far as the evidence is concerned, the jury was warranted in returning the verdict which it did.

In the case of United States v. Carr, Federal Case No. 14732, Carr was charged with murder, and the court in its charge to the jury instructed them that a recent Act of Congress declared that in all criminal causes the defendant might be found guilty of any offense, the commission of which was necessarily in-

cluded in that with which he was charged in the indictment. (Sec. 9, Act June 1, 1871, 17 Stat. 198). The court instructed the jury that the crime of manslaughter was included in the crime of willful murder. This case is cited in United States v. Meagher, 37 Fed. 878, to the same point.

And, in United States v. Dixon, Federal Case No. 14968, the defendant was tried upon an indictment for burglary. The jury having retired, sent to the court to know whether they could, upon that indictment, find the prisoner guilty of stealing only, and acquit him of the burglary. The court instructed the jury that it was in their power to find a general verdict of guilty, or not guilty, or to find specially that the prisoner was guilty of a part only of the facts which go to constitute the crime of burglary; and that if they were not satisfied as to the breaking and entering the house in the night time, they might find the defendant guilty of larceny only. Whereupon, the jury retired and in a short time returned a verdict of not guilty as to the breaking and entering the house in the night, but guilty of feloniously stealing the goods.

Another case in point is United States v. Cropley, Federal Case No. 14892. In that case defendant's counsel moved the court to instruct the jury that if they should not find the assault to be with intent to murder, they must find the defendant not guilty. The court refused to give the instruction and directed the jury that they might, if justified by the evidence, find

the defendant guilty of the assault only, without the intent charged.

In United States v. Read, Federal Case No. 16126, an indictment was filed against William Read for breaking the storehouse of Cook & Clare, and taking therefrom goods of the value of more than $4000.00. The jury having inquired whether they might find the prisoner guilty of simple larceny upon this indictment, the Court informed them that they might. The jury accordingly found the defendant guilty of stealing the goods, but not of breaking the storehouse.

In State v. May, (Kans.) 93 Pac. 159, 14 L. N. S. 603, the defendant was prosecuted upon the charge of setting up and keeping a gambling device, and was convicted of the inferior offense of betting upon a game of chance at a gambling resort. He appealed, and one of his grounds of error was that the court erred in instructing the jury that the information charged a violation of the statute upon which the verdict was based. In the course of the opinion, after setting out the statute upon which the information was obviously drawn, and the one to which the verdict obviously referred, said:

> "From this statement of the statutes, the information, and the verdict, it appears that the section upon which the conviction was had is directed against betting under certain circumstances, and that the defendant was not in direct and express terms charged with having bet upon anything. A conviction may always be had upon any less offense which is included within that charged (Gen. Stat. 1901, Sec. 5564), or, as said in

State v. Burwell, 34 Kan. 312, 8 Pac, 470: 'Wherever a person is charged upon information with the commission of an offense under one section of the statutes, and the offense charged includes another offense under another section of the statutes, the defendant may be found guilty of either offense.' Some liberality of interpretation is permitted in such cases. The rule is thus stated in 22 Cyc. Law. & Proc. p. 476: 'While it is not necessary to make a specific charge of all the offenses included in the charge for which the indictment is drawn, a conviction cannot be had of a crime as included in the offense specifically charged, unless the indictment, in describing the major offense, contains all the essential elements of the less, or the greater offense necessarily includes all the essential ingredients of the less.' In several instances it has been held that words used in the statute defining the inferior offense need not be used in the information, where the statements there made in charging the greater offense, necessarily show the existence of all the facts essential to constitute the less. For example, a conviction under a statute Sec. 2029, Gen. Stat. 1901) against administering medicine with the intent to procure an abortion has been sustained under an information which did not use the word 'abortion,' being drawn under statute forbidding the giving of medicine to a woman pregnant with a quick child with the intent to destroy such child; the reasoning being that the destruction of a quick child necesarily involved the procuring of an abortion.. State v. Watson, 30 Kan. 281, 1 Pac. 770. The exact question to be here determined, is, therefore, whether the acts charged in the information necessarily involved those found in the verdict. The allegations that the defendant set up a gambling device, and induced persons to play for money by means thereof, sufficiently

imply that the place where it was maintained was one to which persons were accustomed to resort for the purpose of gambling, and which was kept for that purpose."

Section 1035 of the Revised Statutes of the United States (1701 Comp. Stat.) controls this case, and is as follows:

> "In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged; *provided,* that such attempt be itself a separate offense."

In Stevenson v. United States, 162 U. S. 466, 40 L. ed. 980, Mr. Justice Peckham, who delivered the opinion of the court, after quoting Sec. 1035, R. S., said:

> "Under this statute the defendant charged in the indictment with the crime of murder may be found guilty of the lower grade of crime, viz., manslaughter. There must, of course, be some evidence which tends to bear upon that issue. The jury would not be justified in finding a verdict of manslaughter if there were no evidence upon which to base such a finding, and in that event the court would have the right to instruct the jury to that effect. Sparf v. United States, 156 U. S. 51."

In the case of Sparf v. United States, cited above, the defendant was charged with murder, and in the course of the opinion delivered by Mr. Justice Harlan, the court said:

> "The court below assumed, and correctly, that Sec. 1035 of the Revised Statutes did not authorize the jury in a criminal case to find the defen-

> dant guilty of a less offense than the one charged, unless the evidence justified them in so doing. Congress did not intend to invest juries in criminal cases with power arbitrarily to disregard the evidence and the principles of law applicable to the case on trial. The only object of that section was to enable the jury, in case the defendant was not shown to be guilty of the particular crime charged, *and if the evidence permitted them to do so,* to find him guilty of a lesser offense necessarily included in the one charged, or of the offense of attempting to commit the one charged."

See also, United States v. Lewis, 111 Fed. 630.

United States v. Linnier, 125, Fed. 83.

United States v. Hanslee, 79 Fed. 303.

In conclusion, it is respectfully submitted, first, that the verdict is responsive to the charge contained in the information, and, second that no constitutional rights of the plaintiff in error have been violated by the entry of judgment herein, and, third, that the action of the jury is within the scope of Sec. 1035 of the Revised Statutes, and, fourth, that the judgment should be affirmed.

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